

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Southwest Power Pool, Inc.

Docket No. ER07-211-000

ORDER ACCEPTING LARGE GENERATOR
INTERCONNECTION AGREEMENT

(Issued January 12, 2007)

1. On November 13, 2006, Southwest Power Pool, Inc. (SPP) filed an unexecuted Large Generator Interconnection Agreement (LGIA) between Flying Cloud, L.L.C. (Flying Cloud)¹ as Interconnection Customer, Southwestern Public Service Company (SPS)² as Transmission Owner, and SPP as Transmission Provider. SPP states in its transmittal letter that the LGIA conforms to the *pro forma* LGIA in Attachment V of its open access transmission tariff (OATT or Tariff), but was not executed by SPP due to a dispute over the satisfaction of obligations under section 11.3 of the Large Generation Interconnection Procedures (LGIP).
2. As discussed below, we conclude that SPP failed to follow its LGIP, and accept the LGIA effective, after 60 day's notice, on January 13, 2007.

¹ Flying Cloud is owned by Airtricity, Inc., and is in the business of developing and operating specific wind power facilities.

² SPS is a wholly owned utility operating company subsidiary of Xcel Energy Services, Inc (Xcel). The SPS transmission system is operated by SPP, the regional transmission organization and Transmission Provider.

Background

A. The Interconnection Process

3. As required by Order No. 2003,³ SPP has a standard LGIP and *pro forma* LGIA that are set forth in Attachment V of SPP's OATT. To begin the interconnection process, an Interconnection Customer is required to submit to the Transmission Provider an Interconnection Request form. The parties then proceed to collaborate on (1) an Interconnection Feasibility Study, (2) an Interconnection System Impact Study, and (3) an Interconnection Facilities Study, consecutively. Once the final Interconnection Facilities Study report has been issued, the Transmission Provider must tender a draft LGIA to the Interconnection Customer, together with draft appendices. The Interconnection Customer will then return an executed and completed draft LGIA, together with draft appendices, to the Transmission Provider.⁴ At any time after the Interconnection Customer executes the Interconnection Facilities Study Agreement, at the request of the Interconnection Customer, negotiations concerning the appendices to the LGIA can begin.

4. When negotiations have ended, the Transmission Provider must tender to the Interconnection Customer the final LGIA.⁵ Within fifteen (15) business days of receipt of the final LGIA, the Interconnection Customer must provide the Transmission Provider with (a) reasonable evidence of continued site control⁶ or (b) post \$250,000 in security.

³ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 Fed. Reg. 49,845 (August 19, 2003), FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, 69 Fed. Reg. 15,932 (March 26, 2004), FERC Stats. & Regs. ¶ 31,160 (2004), *order on reh'g*, Order No. 2003-B, 70 Fed. Reg. 265 (January 4, 2005), FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, 70 Fed. Reg. 37,662 (June 30, 2005), FERC Stats. & Regs. ¶ 31,190 (2005), *appeal docketed sub nom. National Association of Regulatory Utility Commissioners v. FERC*, Nos. 04-1148, *et al.* (D.C. Cir Apr. 29, 2004 and later).

⁴ Southwest Power Pool, FERC Open Access Transmission Tariff, Fourth Revised Vol. No. 1, Sheet Nos. 279-286, sections 6-8 (SPP Attachment V).

⁵ *Id.* at Sheet No. 288, section 11.2.

⁶ Site control is defined in SPP's Attachment V as documentation reasonably demonstrating: (1) ownership of, a leasehold interest in, or a right to develop a site for the purpose of constructing the Generating Facility; (2) an option to purchase or acquire a leasehold site for such purpose; or (3) an exclusivity or other business relationship

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At the same time, Interconnection Customer must also provide reasonable evidence that one or more of the following milestones in the development of the Large Generating Facility, at Interconnection Customer's election, has been achieved:

(i) the execution of a contract for the supply or transportation of fuel to the Large Generating Facility; (ii) the execution of a contract for the supply of cooling water to the Large Generating Facility; (iii) execution of a contract for the engineering for, procurement of major equipment for, or construction of, the Large Generating Facility; (iv) execution of a contract for the sale of electric energy or capacity from the Large Generating Facility; or (v) application for an air, water, or land use permit.⁷

5. The Interconnection Customer has the option then to (i) execute two (2) originals of the tendered LGIA and return them to the Transmission Provider: or (ii) request in writing that the Transmission Provider file with the Commission an LGIA in unexecuted form. If the Transmission Provider receives a request in writing to file with the Commission or if the executed LGIA does not conform with a Commission-approved standard form of interconnection agreement, the Transmission Provider has ten (10) business days to file an unexecuted LGIA with the Commission. The Transmission Provider must file the unexecuted LGIA with the Commission, together with its explanation of any matters as to which the Interconnection Customer and Transmission Provider disagree and support for the costs that the Transmission Provider proposes to charge the Interconnection Customer under the LGIA.⁸

6. If the Interconnection Customer executes the final LGIA, the Transmission Provider and Interconnection Customer shall perform their respective obligations in accordance with the terms of the LGIA, subject to modification by the Commission. Upon submission of an unexecuted LGIA, Interconnection Customer and Transmission

between Interconnection Customer and the entity having the right to sell, lease or grant Interconnection Customer the right to possess or occupy a site for such purpose.

⁷ *Id.* at Sheet No. 289, section 11.3.

⁸ *Id.*

Provider shall promptly comply with the unexecuted LGIA, subject to modification by the Commission.⁹

B. The Instant Proceeding

7. In September of 2003, Flying Cloud submitted an Interconnection Request for a new 240 MW wind generation project that SPP accepted and placed in its queue. The issues involved in this proceeding arose as Flying Cloud's Interconnection Request entered the Facilities Study phase of the interconnection process. Flying Cloud originally requested a Facilities Study specifying generating facilities of up to 160 General Electric (GE) 1.5 MW wind turbines, but on March 22, 2006, Flying Cloud requested a Facilities Study specifying Mitsubishi wind turbines. Nevertheless, SPP sent Flying Cloud and SPS the GE LGIA for execution. On April 20 and on April 27, 2006, respectively, Flying Cloud and SPS executed the GE LGIA.

8. Flying Cloud submitted a Term Sheet Agreement¹⁰ which referenced "potential wind farm projects" and stated that Flying Cloud would enter into a Turbine Supply Agreement to be based on the Term Sheet Agreement. On May 8, 2006, SPP notified Flying Cloud that the Term Sheet Agreement did not comply with section 11.3 of the LGIP. Subsequently, Flying Cloud submitted a Frame Agreement¹¹ for the purchase of Mitsubishi wind turbines, but SPP continued to deny satisfaction of section 11.3 of the LGIP because the Frame Agreement did not specify Flying Cloud's interconnection project with SPP nor did it demonstrate that the turbines would be used during the time period relevant for the construction of Flying Cloud's project.¹²

⁹ *Id.* at Sheet No. 290, section 11.4.

¹⁰ The Commission was provided no specific information as to what the Term Sheet Agreement entails.

¹¹ The Commission was provided no specific information as to what a Frame Agreement entails nor how this document differs from a Term Sheet Agreement or from a Turbine Supply Agreement.

¹² SPP states that the wind turbines specified in the Frame Agreement were for a 2007 delivery when the interconnection project involved in the Interconnection Agreement would not have required the turbines until 2008. SPP concludes that a blanket (frame) agreement from an equipment manufacturer does not meet LGIP section 11.3 requirements unless the agreement specifically denotes delivery to the project

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9. Flying Cloud's March-requested restudy incorporating the switch to Mitsubishi wind turbines was concluded in June 2006. Flying Cloud claims, however, that it was not given a copy of the restudy nor afforded the opportunity to comment on its contents as required by section 8.3 of the LGIP.¹³ SPP contends that section 8.3 of the LGIP regarding communicating the results of the restudy is inapplicable for an Interconnection System Impact Study,¹⁴ but that the study was nevertheless at Flying Cloud's consent. According to SPP, the results of the restudy indicated that Mitsubishi wind turbines are not interchangeable with GE wind turbines for this project and that the material differences in the two different wind turbines would result in different system requirements for each.

10. On September 29, 2006, SPP submitted a revised LGIA to Flying Cloud for execution which gave Flying Cloud three choices for its project given the results of the restudy.¹⁵ SPP made clear that if Flying Cloud did not select one of the three choices and execute the new LGIA, SPP would not file the original GE LGIA with the Commission in executed form because it wanted the Commission to clarify whether the Frame Agreement complied with section 11.3 of SPP's LGIP. On October 13, 2006, Flying Cloud informed SPP by letter that Flying Cloud was unable to evaluate the three options SPP had presented because Flying Cloud had not seen, reviewed, or been provided with an opportunity to comment on the June 2006 restudy.

referenced in the LGIA and for delivery during the timeframe relevant to the project references in the LGIA.

¹³ Flying Cloud, LLC, December 4, 2006 Protest at 3 (Flying Cloud Protest). Flying Cloud asserts that it first learned the results of the restudy through SPP's September 29, 2006 letter.

¹⁴ SPP characterizes the restudy as an Interconnection System Impact Study under section 7 of the LGIP, not an Interconnection Facilities Study under section 8 of the LGIP.

¹⁵ The three choices included: 1) upgrading or installing facilities for use of Mitsubishi turbines at 240 MW; 2) limiting the project to 68 MW; or 3) utilizing a different arrangement for the wind farm and limiting the project to 113 MW.

11. On November 13, 2006, SPP filed a partially executed LGIA¹⁶ which reportedly conforms to the *pro forma* LGIA and includes the GE wind turbines. SPP requests that the Commission address whether the Frame Agreement specifying Mitsubishi wind turbines was adequate to satisfy section 11.3 of SPP's LGIP. SPP states that without the Commission determination on the issue, SPP is unable to confirm Flying Cloud's generation interconnection queue position.

Notice and Responsive Filings

12. Notice of the filing was published in the *Federal Register*, 71 Fed. Reg. 69,107 (2006), with interventions and protests due on or before December 4, 2006. Flying Cloud filed a timely motion to intervene and protest. Xcel submitted a late-filed motion to intervene out of time on behalf of SPS. SPP filed an Answer to Flying Cloud's Protest.

13. Flying Cloud presents in its protest three arguments regarding SPP's filing of an unexecuted LGIA, supporting its request that the Commission reject SPP's arguments. First, Flying Cloud alleges that the purported dispute SPP raises in its filing is no basis for SPP's refusal to sign the proposed *pro forma* LGIA.¹⁷ Flying Cloud states that there was no dispute over any term of the LGIA and therefore no basis for SPP to withhold its signature. Therefore, there are no nonconforming provisions to the LGIA for the Commission to approve or reject. In the alternative, if a valid dispute did exist between the parties regarding completion of the section 11.3 of the LGIP milestones, Flying Cloud states that SPP has not fully complied with the LGIP's dispute resolution process. Specifically, Flying Cloud alleges that SPP is attempting to inject a performance dispute into the LGIA approval process to circumvent the dispute resolution procedures of the LGIP.

14. Secondly, Flying Cloud argues that the milestone obligation is not ripe. According to Flying Cloud, SPP failed to inform the Commission that, by agreement of the parties, Flying Cloud is not required to meet the milestones of section 11.3 of the LGIP until fifteen days after the filing of the final LGIA. Therefore, it is Flying Cloud's position that SPP's purported dispute cannot be used as basis for refusing to sign the proposed LGIA.¹⁸ According to Flying Cloud, because SPP has not signed the LGIA, Flying Cloud's obligation to comply with section 11.3 of the LGIP has not matured.

¹⁶ The LGIA has been executed by all parties except SPP.

¹⁷ Flying Cloud Protest at 5-6.

¹⁸ *Id.* at 6-7.

15. Thirdly, Flying Cloud claims SPP's interpretation of section 11.3 of the LGIP would stifle the development of wind energy projects and severely constrain wind power generators' ability to deploy the most efficient, least cost, newest technology in their projects.¹⁹ Flying Cloud states that nothing in section 11.3 of the LGIP requires the Interconnection Customer to enter into project-specific contracts and, as a practical matter, the Interconnection Customer needs the flexibility to assign turbines to projects once issues such as environmental or financial difficulties are resolved.²⁰ Flying Cloud asserts that SPP bears no risk at this early stage because SPP has no performance obligation until Flying Cloud issues an authorization to proceed with construction in early January 2008. Nevertheless, Flying Cloud submits that it has presented reasonable evidence sufficient to satisfy the milestones of section 11.3 of the LGIP through the Wind Turbine Supply, Technical Assistance and Warranty Agreement (TSA) between Mitsubishi Power Systems, Inc., and Airtricity, Inc., Flying Cloud's parent company.²¹

16. In SPP's Answer to Flying Cloud's Protest, SPP submits four main arguments to support its original request that the Commission determine whether the Frame Agreement for the purchase of Mitsubishi wind turbines was sufficient to satisfy the requirements of section 11.3 of the LGIP. Firstly, SPP reiterates that the evidence Flying Cloud presented in purported satisfaction of section 11.3 of the LGIP was insufficient because neither the Term Sheet Agreement nor the Frame Agreement specified this particular interconnection. Furthermore, SPP argues that the Mitsubishi wind turbines cannot unilaterally be substituted for GE wind turbines. SPP states that it learned, for the first time, in Flying Cloud's Protest filed on December 4, 2006, the details of the Turbine Supply Agreements between Flying Cloud and Mitsubishi, and Airtricity and Mitsubishi and GE.²² Secondly, SPP alleges that Flying Cloud is misinterpreting SPP's Tariff requirements with regard to the dispute resolution process, the interpretation of section 11.3 of the LGIP, and Flying Cloud's definition of "final." Thirdly, SPP claims, that Flying Cloud was requesting SPP to waive satisfaction of the LGIP. Lastly, SPP submits that Flying Cloud *did* know of the restudy and that SPP *did* provide Flying Cloud with access to the results of the restudy once it was completed.

¹⁹ Id. at 10.

²⁰ Id. at 9.

²¹ Id. at 8.

²² Answer at 4.

17. Xcel filed on behalf of its utility operating company affiliate SPS, Transmission Owner and party to the LGIA. While Xcel does not take a position regarding the dispute between SPP and Flying Cloud, it does state that Commission guidance on whether Flying Cloud has met the requirements of section 11.3 of the LGIP would benefit Transmission Providers and Transmission Owners in other parts of the country on the application of section 11.3 of the LGIP requirements to wind generation plants, where, as Xcel claims, the equipment for the generating plant can be redirected to another generation project relatively easily.²³

Discussion

A. Procedural Matters

18. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the timely, unopposed motion to intervene serves to make Flying Cloud a party to this proceeding.

19. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedures, 18 C.F.R. § 385.214(d) (2006), the Commission will grant Xcel's late-filed motion to intervene on behalf of SPS given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

20. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006) prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept SPP's answer because it has provided information that has assisted us in our decision-making process.

B. Commission Determination

21. The LGIP governs the process for requesting and studying interconnection requests and negotiating interconnection agreements. The standardization of the interconnection process was undertaken in part because of generator concerns over delays and uncertainty due to the lack of firm deadlines in the transmission providers' *pro forma* tariffs.²⁴ The specificity in the LGIP counteracts the fact that a Transmission Provider

²³ Xcel Energy Services December 14, 2006 Motion to Intervene Out of Time at 3-4.

²⁴ Standardization of Generator Interconnection Agreements and Procedures, Notice of Proposed Rulemaking, 67 Fed. Reg. 22,249 (May 2, 2002), FERC Stats. & Regs. ¶ 32,560 at p. 34,174 (2002). *See also* Order No. 2003 at P 11.

such as SPP controls both the interconnection process, which is conducted according to the Transmission Provider's Tariff, and the negotiation of an LGIA, because it is a service agreement under the Transmission Provider's Tariff.

22. Based on the language in section 11.3 of the LGIP, the Commission expects Transmission Providers to take relatively quick action to execute final LGIAs that have been tendered to and executed by Interconnection Customers. If the LGIP allowed Transmission Providers to sit on an agreement that has been executed by an Interconnection Customer and raise an objection later, it would allow Transmission Providers to create the kind of delay and uncertainty that Order No. 2003 was designed to prevent. The LGIP was designed to bring certainty to the process, and Flying Cloud reasonably expected that its signature meant that the LGIA was enforceable as written. Therefore, Flying Cloud properly assumed it was signing the final version of the LGIA, because that is the version of the document SPP tendered for Flying Cloud's and SPS's signatures.

23. Flying Cloud's position is supported by the language of the LGIP itself. Under LGIP section 11.4, once Flying Cloud and SPS signed the document, it essentially became enforceable. Section 11.4 requires that once the Interconnection Customer signs the final LGIA, the parties start performing their obligations under the LGIA.²⁵ Section 11.4 of the LGIP does not include an obligation for the Transmission Provider to sign because the Transmission Provider's objections would have been addressed as part of the negotiating process *before* the Transmission Provider submitted the final LGIA to the Interconnection Customer for signature. Therefore, the LGIP in section 11.4 takes execution of the final LGIA as a foregone conclusion. Similarly, it could be argued that SPP violated the negotiating process in section 11.2 because once a final LGIA is tendered for signature, the Transmission Provider has no right to modify the document unilaterally; it is up to the Interconnection Customer to determine whether to sign the document or request that it be modified or submitted to the Commission as an unexecuted agreement.

24. SPP did later resort to section 13.5.1 in offering Flying Cloud an opportunity to "cure" the LGIA. SPP did so out of sequence. Had SPP never submitted the LGIA with GE turbines to Flying Cloud for signature, it would have been proper to renegotiate

²⁵ Section 11.4 of the LGIP states that: "If the Interconnection Customer executes the final LGIA, the Transmission Provider and the Interconnection Customer shall perform their respective obligations in accordance with the terms of the LGIA, subject to modification by FERC. Upon submission of an unexecuted LGIA, both Interconnection Customer and Transmission Provider shall promptly comply with the unexecuted LGIA, subject to modification by FERC."

Appendix A. However, SPP had already exited the LGIA negotiation process once it tendered the LGIA for signature. For that reason, Flying Cloud had no cause to think that SPP objected to any part of the LGIA because those objections would have been apparent in the form of the LGIA tendered to Flying Cloud and SPS.

25. Therefore, despite the extensive arguments of both parties, the Commission need not address whether the documents presented by Flying Cloud satisfied the milestones requirement of section 11.3 of the LGIP. Under this set of facts, it was unreasonable for SPP to withhold its signature from the final tendered LGIA because of its contention that Flying Cloud had failed to meet the milestones in section 11.3 of the LGIP, when the parties had incorporated the milestones of section 11.3 of the LGIP into the final LGIA. We conclude that under the terms of SPP's LGIP, the final LGIA became enforceable when it was signed by Flying Cloud. Flying Cloud must be given 15 days from the date of this order to meet the milestones incorporated into the LGIA from section 11.3 of the LGIP. Any disputes regarding Flying Cloud's compliance with these milestones should be processed according to the dispute resolution procedures in the executed LGIA. We, therefore, accept the agreement effective January 13, 2007, sixty (60) days after filing.

The Commission orders:

(A) The LGIA is accepted effective January 13, 2007.

(B) SPP is directed to provide Flying Cloud with an additional 15 days from the date of this order to satisfy the milestone requirement incorporated into the LGIA from section 11.3 of the LGIP.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.